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1972CV00329 Ohmharsh Corp Doing Business as AM PM Convenience et al vs. Town of Barnstable Board of Health

- Case Type
- Equitable Remedies
- Case Status
- Open
- File Date
- 06/27/2019
- DCM Track:
- A - Average
- Initiating Action:
- Declaratory Judgment G.L. c. 231A
- Status Date:
- 06/27/2019
- Case Judge:
-
- Next Event:
-

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[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

Party Information

Ohmharsh Corp
- Plaintiff

Alias

Party Attorney

- Attorney
- Oyer, Esq., Jess Donovan
- Bar Code
- 683242
- Address
- Fletcher Tilton PC
- 370 Main St
- 12th Floor
- Worcester, MA 01608
- Phone Number
- (508)459-8019
- Attorney
- Ponte, Esq., Adam Chin
- Bar Code
- 684720
- Address
- Fletcher Tilton, P.C.
- 12 POST OFFICE SQUARE
- 6TH FLOOR
- Boston, MA 02109
- Phone Number
- (508)459-8000
- Attorney
- Tinsley, Esq., Patrick
- Bar Code
- 663648
- Address
- Fletcher Tilton
- 370 Main St 12th Floor
- Worcester, MA 01608
- Phone Number
- (508)459-8211

[More Party Information](#)

M.A. General Inc.
- Plaintiff

Alias

Party Attorney

- Attorney
- Oyer, Esq., Jess Donovan
- Bar Code
- 683242
- Address

- Fletcher Tilton PC
370 Main St
12th Floor
Worcester, MA 01608
- Phone Number
- (508)459-8019
- Attorney
- Ponte, Esq., Adam Chin
- Bar Code
- 684720
- Address
- Fletcher Tilton, P.C.
12 POST OFFICE SQUARE
6TH FLOOR
Boston, MA 02109
- Phone Number
- (508)459-8000

[More Party Information](#)

Rashid, Zahid
- Plaintiff

Alias

Party Attorney

- Attorney
- Oyer, Esq., Jess Donovan
- Bar Code
- 683242
- Address
- Fletcher Tilton PC
370 Main St
12th Floor
Worcester, MA 01608
- Phone Number
- (508)459-8019
- Attorney
- Ponte, Esq., Adam Chin
- Bar Code
- 684720
- Address
- Fletcher Tilton, P.C.
12 POST OFFICE SQUARE
6TH FLOOR
Boston, MA 02109
- Phone Number
- (508)459-8000

[More Party Information](#)

Noor Inc.
- Plaintiff

Alias

Party Attorney

- Attorney
- Oyer, Esq., Jess Donovan
- Bar Code
- 683242
- Address
- Fletcher Tilton PC
370 Main St
12th Floor
Worcester, MA 01608
- Phone Number
- (508)459-8019
- Attorney
- Ponte, Esq., Adam Chin
- Bar Code
- 684720
- Address
- Fletcher Tilton, P.C.
12 POST OFFICE SQUARE
6TH FLOOR
Boston, MA 02109
- Phone Number
- (508)459-8000

[More Party Information](#)

Rashid, Muhammad
- Plaintiff

Alias

Party Attorney

- Attorney
- Oyer, Esq., Jess Donovan

- Bar Code
- 683242
- Address
- Fletcher Tilton PC
- 370 Main St
- 12th Floor
- Worcester, MA 01608
- Phone Number
- (508)459-8019
- Attorney
- Ponte, Esq., Adam Chin
- Bar Code
- 684720
- Address
- Fletcher Tilton, P.C.
- 12 POST OFFICE SQUARE
- 6TH FLOOR
- Boston, MA 02109
- Phone Number
- (508)459-8000

[More Party Information](#)

Town of Barnstable Board of Health
- Defendant

Alias

Party Attorney

- Attorney
- McLaughlin, Jr., Esq., Charles S
- Bar Code
- 336880
- Address
- Barnstable Town Attorneys Office
- 367 Main St
- Hyannis, MA 02601
- Phone Number
- (508)862-4620

[More Party Information](#)**Events**

Date	Session	Location	Type	Event Judge	Result
07/11/2019 02:00 PM	Second Session	Courtroom 2	Hearing on Preliminary Injunction		Held - Under advisement

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	06/27/2019	09/25/2019	90	
Answer	06/27/2019	10/25/2019	120	
Rule 12/19/20 Served By	06/27/2019	10/25/2019	120	
Rule 12/19/20 Filed By	06/27/2019	11/25/2019	151	
Rule 12/19/20 Heard By	06/27/2019	12/24/2019	180	
Rule 15 Served By	06/27/2019	08/20/2020	420	
Rule 15 Filed By	06/27/2019	09/21/2020	452	
Rule 15 Heard By	06/27/2019	09/21/2020	452	
Discovery	06/27/2019	06/16/2021	720	
Rule 56 Served By	06/27/2019	07/16/2021	750	
Rule 56 Filed By	06/27/2019	08/16/2021	781	
Final Pre-Trial Conference	06/27/2019	12/13/2021	900	
Judgment	06/27/2019	06/27/2022	1096	
Under Advisement	07/11/2019	08/10/2019	30	

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
06/27/2019	Original civil complaint filed.	1
06/27/2019	Civil action cover sheet filed.	2
06/27/2019	Plaintiff(s) Ohmharsh Corp Doing Business as AM PM Convenience, M.A. General Inc. Doing Business as Sea Street Food Market, Zahid Rashid As Owner of Sea Street Food Mart, Noor Inc. Doing Business as Hyannis Convenience Store, Muhammad Rashid As Owner of Hyannis Convenience's EX PARTE Motion for a Temporary Restraining Order	3
06/27/2019	Plaintiff(s) Ohmharsh Corp Doing Business as AM PM Convenience, M.A. General Inc. Doing Business as Sea Street Food Market, Zahid Rashid As Owner of Sea Street Food Mart, Noor Inc. Doing Business as Hyannis Convenience Store's EX PARTE Motion for a Preliminary Injunction	4
06/27/2019	Summons and order of notice issued on a EX PARTE Motion for a Preliminary Injunction , returnable on 07/11/2019 02:00 PM Hearing on Preliminary Injunction.	5
06/27/2019	Ohmharsh Corp Doing Business as AM PM Convenience, M.A. General Inc. Doing Business as Sea Street Food Market, Zahid Rashid As Owner of Sea Street Food Mart, Noor Inc. Doing Business as Hyannis Convenience Store's Memorandum in support of Plaintiff's Motion for Preliminary Injunction	6
06/27/2019	Plaintiff's MOTION for alternative service by means of special process server for Ohmharsh Corp Doing Business as AM PM Convenience.	7
06/27/2019	The following form was generated: Notice to Appear Sent On: 06/27/2019 15:26:28	
06/28/2019	Endorsement on Motion for alternate service (#8.0): ALLOWED	8
07/02/2019	Defendant Town of Barnstable Board of Health's EMERGENCY Motion to continue / reschedule an event 07/11/2019 02:00 PM Hearing on Preliminary Injunction	9
07/02/2019	Opposition to emergency motion to continue hearing filed by Ohmharsh Corp Doing Business as AM PM Convenience, M.A. General Inc. Doing Business as Sea Street Food Market, Zahid Rashid As Owner of Sea Street Food Mart, Noor Inc. Doing Business as Hyannis Convenience Store	9.1
07/03/2019	Endorsement on Motion to continue / reschedule an event (#9.0): DENIED The parties shall appear.	
07/05/2019	Short Order of Notice, returned SERVED c/o Paul J. Canniff, D.M.D. Applies To: Town of Barnstable Board of Health (Defendant)	10
07/05/2019	Short Order of Notice, returned SERVED c/o John Norman Applies To: Town of Barnstable Board of Health (Defendant)	11
07/05/2019	Short Order of Notice, returned SERVED c/o Donald A. Guadagnoli, M.D. Applies To: Town of Barnstable Board of Health (Defendant)	12
07/10/2019	Opposition to motion for temporary restraining order and preliminary injunction filed by Town of Barnstable Board of Health	13
07/11/2019	APPEARANCE: On this date Jess Donovan Oyer, Esq. added as Private Counsel for all Plaintiffs	14
07/11/2019	Matter taken under advisement: Hearing on Preliminary Injunction scheduled on: 07/11/2019 02:00 PM. Has been: Held - Under advisement. Hon. Robert C Rufo, Presiding	
07/11/2019	APPEARANCE: On this date Adam Chin Ponte, Esq. added as Private Counsel for all Plaintiffs	15
07/16/2019	Affidavit of Mark Hymovitz	16

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[Ref](#)
[Nbr.](#)

07/16/2019 Endorsement on Motion for a Preliminary Injunction (#6.0): DENIED

Ohmharsh Corp. et al, owners and operators of convenience stores which sell tobacco products, brought an action seeking certiorari review pursuant to G. L. c. 249, § 4 of the Board of Health of Barnstable's adoption of a regulation limiting sales of flavored tobacco products and non-combustible e-cigarette products to smoking bars and adult-only retail tobacco stores. The matter is before this court on the plaintiffs' motions for a temporary restraining order and preliminary injunction prohibiting any enforcement of the regulation until there is a judgment in the underlying action.

In determining whether a preliminary injunction should be granted, the court engages in a balancing test. See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). The Supreme Judicial Court set forth the prevailing standard as follows:

“[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.”

GTE Products Corp. v. Stewart, 414 Mass. 721, 722-723 (1993) (quoting *Packaging Indus. Group*, 380 Mass. at 617); see also *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999) and *Boston Police Patrolmen's Assn. v. Police Dept. of Boston*, 446 Mass. 46, 49-50 (2006) (“When a private party seeks a preliminary injunction, the moving party is required to show that an irreparable injury would occur without immediate injunctive relief.”).

The plaintiffs argue that they have a high likelihood of success on the merits because there is no rational basis for the regulation where the board lacked substantial evidence that minors were buying flavored tobacco or e-cigarettes from convenience stores in the town, and arbitrarily chose to limit sales of those materials to four adults-only retail tobacco stores. The plaintiffs claim that there will be substantial economic injury to their businesses, including possible business closures, if the regulation is enforced. The board argues that the plaintiffs have no likelihood of success on the merits, because the board received ample expert evidence, including testimony by Dr. Jeffrey Spillane and Cape Cod Regional Tobacco Control Program Director Robert Collett, about the attractiveness of flavored tobacco and e-cigarettes to minors and the harms of early nicotine exposure, which rationally supports limiting sales to adults-only establishments. Further, the board argues that the substantial and on-going risk to the health of minors demonstrates the strong public interest in enforcement of the regulation without delay, and any economic impact on the plaintiffs could be avoided if they were to qualify for an adults-only retail tobacco store license.

Given the “strong presumption of validity” of local health regulations, *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 220 (2001), and the extensive scientific and expert testimony received by the board in support of limiting access to flavored tobacco and e-cigarette products to adults-only establishments, the court finds that the plaintiffs have little likelihood of success in the underlying action, despite their submission of opposing expert testimony. Taking this limited likelihood of success on the merits and the plaintiffs' largely speculative claims of an existential threat to their businesses, and balancing them with the substantial likelihood that the board's regulation will be affirmed and the significant potential for irreparable health consequences of underage tobacco and nicotine use if an injunction is issued, this court concludes that the scales tip in favor of the defendant regarding the requested injunctive relief.

For the above stated reasons, the plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction are respectfully DENIED.
(copy mailed to PT, ACP, CSM)

Case Disposition

Disposition	Date	Case Judge
Pending		